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Supreme Court, U.S.
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No. 98-190

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

JOHN NORMAN HUFFINGTON,
Petitioner,

v.

EUGENE NUTH, WARDEN, AND THE ATTORNEY GENERAL OF THE STATE OF MARYLAND,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF IN OPPOSITION

J. JOSEPH CURRAN, JR.
Attorney General of Maryland

GARY E. BAIR*
ANNABELLE L. LISIC
Assistant Attorneys General

Office of the Attorney General
200 Saint Paul Place
Baltimore, Maryland 21202
(410) 576-6422

Counsel for Respondents

**Counsel of Record*

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QUESTIONS PRESENTED

1. Did the courts below correctly reject Huffington's Due Process Clause challenge to the state courts' determination that the Rassa transcript was inadmissible hearsay?

2. Did the courts below correctly reject Huffington's assertions of ineffective assistance of trial counsel?

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BRIEF IN OPPOSITION

Respondent, the State of Maryland, respectfully requests that this Court deny the Petition for Writ of Certiorari of Petitioner, John Norman Huffington.

OPINIONS BELOW

Huffington seeks review of the reported decision of United States Court of Appeals for the Fourth Circuit in *Huffington v. Nuth*, 140 F.3d 572 (4th Cir. 1998) (*Huffington IV*), affirming the denial of his federal petition for writ of habeas corpus. A copy of this decision is reproduced in the appendix to Huffington's petition, (App. to Pet. for Cert. at 1a-26a), as are copies of the unpublished decisions of the lower court, the United States District Court for the District of Maryland, (App. to Pet. for Cert. at 27a-43a).

JURISDICTION

Huffington has invoked this Court's jurisdiction pursuant to 28 U.S.C. § 1254(1). (Pet. for Cert. at 2).

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provisions on which Huffington relies are reproduced on page 2 of his petition.

STATEMENT OF THE CASE

A. Procedural history.

1. The 1981 trial and appeal and the 1983 retrial and appeal

On November 13, 1981, a jury in the Circuit Court for Caroline County, Maryland convicted Huffington of two counts of first-degree felony murder and other charges. The same jury on December 1, 1981 imposed two death sentences for the murders. On appeal, the Court of Appeals of Maryland reversed the convictions and sentences on the ground that the State's rebuttal evidence at the guilt/innocence trial exceeded the scope of proper rebuttal according to Maryland law. *Huffington v. State*, 295 Md. 1, 3, 452 A.2d 1211, 1212 (1982) (*Huffington I*).

On remand, the case was removed at Huffington's request to the Circuit Court for Frederick County. Shortly before the retrial, Huffington moved to dismiss the murder charges under the Double Jeopardy Clause, and noted an interlocutory appeal from the circuit court's denial of that motion. The Court of Appeals of Maryland affirmed the circuit court's denial of the motion to dismiss shortly before the retrial. *Huffington v. State*, 302 Md. 184, 185-86, 486 A.2d 200, 201 (1985) (*Huffington II*).

On November 19, 1983, a Frederick County jury convicted Huffington of two counts of first-degree felony murder, two counts of robbery with a deadly weapon, and other offenses. The same jury on May 1, 1984 returned death sentences on the murder convictions. In the ensuing direct appeal from the convictions and sentences, the Court of Appeals of Maryland affirmed. *Huffington v.*

State, 304 Md. 559, 596, 500 A.2d 272, 290 (1985), *reconsideration denied sub nom. Foster v. State*, 305 Md. 306, 503 A.2d 1326 (1986) (*Huffington III*) (App. to Pet. for Cert. at 48a-93a). This Court denied Huffington's petition for certiorari review of *Huffington III* on July 7, 1986. *Huffington v. Maryland*, 478 U.S. 1023 (1986) (order).

2. First state post conviction proceeding

Huffington filed his first petition for state post conviction relief in the Circuit Court for Frederick County following the conclusion of his final direct appeal. After conducting an evidentiary hearing on the petition as amended, the post conviction court granted relief as to the death sentences, but denied relief as to the guilt/innocence convictions. (App. to Pet. for Cert. at 94a-110a).

Huffington applied to the Court of Appeals of Maryland for leave to appeal from the partial denial of post conviction relief. The Court of Appeals denied the application, (App. to Pet. for Cert. at 111a), and also Huffington's motion for reconsideration. This Court denied Huffington's petition for certiorari review of the post conviction claims. *Huffington v. Maryland*, 502 U.S. 985 (1991).

3. Non-capital resentencing proceeding and second state post conviction proceeding

Following the post conviction court's vacating of the Frederick County death sentences, Huffington faced the possibility of yet a third capital sentencing. The State elected in advance of resentencing to seek terms of incarceration in lieu of death sentences. The circuit court on April 28, 1992 imposed consecutive life terms on the two murder convictions and lesser terms on other convictions. Huffington did not appeal from the

imposition of sentence.

On September 18, 1992, Huffington filed a second petition for post conviction relief in the Circuit Court for Frederick County, asserting a single contention, *i.e.*, that the denial of his application for leave to appeal from the first post conviction proceeding amounted to a violation of his perceived constitutional right to appellate review. The circuit court denied the petition by an order dated November 30, 1992. Huffington then applied to the Court of Special Appeals of Maryland for leave to appeal from the denial of his second petition, and the intermediate appellate court granted the application and remanded the case for an articulation of reasons by the circuit court for its denial of relief. The circuit court then issued another decision expounding upon the denial of relief. Huffington applied once again for leave to appeal to the Court of Special Appeals, but that court denied the renewed application on July 15, 1994.

4. The present habeas proceeding and appeal

Huffington on November 3, 1994 filed a petition for writ of habeas corpus in the United States District Court for the District of Maryland. A federal magistrate judge on February 27, 1996 recommended that the petition be denied. (App. to Pet. for Cert. at 27a-40a). The district court overruled Huffington's objections to the magistrate judge's report and recommendation and denied Huffington's habeas claims. (App. to Pet. for Cert. at 41a-43a).

In the ensuing appeal, the United States Court of Appeals for the Fourth Circuit granted Huffington a certificate of probable cause but ultimately affirmed the district court's denial of habeas relief. *Huffington IV*, 140 F.3d at 578-85 (App. to Pet. for Cert. at 8a-24a). The

Fourth Circuit denied Huffington's petition for rehearing and suggestion for rehearing in banc. (App. to Pet. for Cert. at 44a).

B. Facts established at Huffington's trial and retrial

On direct appeal from the Caroline County trial and sentencing, the Court of Appeals recited the pertinent facts adduced in the State's case-in-chief as follows:

> At the trial, both direct and circumstantial evidence was produced during the prosecution's case in chief that was intended to show that on 25 May 1981 the appellant killed Diane Becker and Joseph Hudson, both of whom had lived together in a trailer located in the Long Bar Harbor campground in Harford County. The direct evidence was adduced by an alleged accomplice, Deno Kanaras, who, at the request of the State, was called by the trial court as a witness. According to the agreed statement of facts, the substance of Kanaras's testimony concerning the events of the evening of 24 May and the morning of 25 May 1981 was as follows:
>
> "Appellant spoke with Hudson at the Golden Forty and arranged to make a cocaine purchase after the bar closed. On leaving the club, they followed Hudson and company to the camp ground, stopping at the 7-11 on the way. At the trailer, Appellant spoke with Hudson about purchasing 3 ½ grams of cocaine, and about arranging a subsequent deal for the remainder of Hudson's cocaine. Appellant purchased the 3 ½ grams for $275, toward which Kanaras contributed $100. Appellant agreed to try to

arrange a deal for the remainder of Hudson's cocaine, approximately another 3 ½ grams, at a price of $350. Kanaras and Appellant then left the trailer and went to Appellant's apartment, arriving at about 3:30 a.m. At the apartment, Kanaras sat in the living room while Appellant went to the bedroom to make some telephone calls. Appellant subsequently returned and indicated that he had arranged a purchase. They returned to the campground where Appellant told Hudson he had a purchaser and also wanted to discuss a bigger deal later that evening. Hudson then got dressed and left a note on a counter in the trailer whereupon the three men left in Kanaras's car. Appellant gave directions to Wheel Road and instructed Kanaras to park the car in the driveway of an old farm. All three men got out of the car and walked up the driveway, Kanaras and Hudson walking side by side, Appellant following. Suddenly, Kanaras heard four or five gunshots and Hudson fell. Appellant reloaded the revolver, approached Hudson, and fired twice from close range into the left side of the head. Kanaras was so shocked he didn't know what to say. Appellant then rolled Hudson's body over and pulled a bag of cocaine out of his shirt pocket. Ultimately, Appellant placed this bag of cocaine into a Marlboro cigarette box. Appellant removed the bag from Hudson's pocket, turned to Kanaras, pointed the gun at him, and ordered him to drive them back to the campground. Appellant said that Hudson had $2000 at the campground, which he wanted. At the entrance to the

campground, Appellant direct Kanaras to park the car some distance from Hudson's trailer so it would not be seen and to leave the car unlocked with the keys in the ignition. Appellant also directed Kanaras to accompany him to the trailer. Appellant opened the door, which was unlocked, and they went in. Becker's son was asleep in the back of the trailer at the time. After Appellant picked up the note Hudson had left and put it in his pocket, they searched the trailer, and Kanaras found the money in a cabinet. Appellant then drew a knife out of his boot and told Kanaras to kill Diane Becker. Kanaras, shocked, said he could not kill her. Appellant then walked over toward the bed, picked up a bottle from the floor, and struck Becker five or six times in the back of the head. Appellant then took the knife and stabbed Becker repeatedly in the chest, back and throat. When Appellant finished stabbing Becker in the throat, Kanaras regained his senses and left the trailer. Appellant was fifteen or twenty feet behind. They ran to the car, Appellant carrying the bottle and pocketbook. They then drove to Appellant's apartment.

"At the apartment, Appellant changed clothes, and cleaned the gun, knife, and bottle with some rags. He counted the money and forced Kanaras to take $840, although Kanaras tried to refuse it. Appellant put his pants in the sink and poured bleach on them in an effort to clean out the bloodstains. Later, he put the pants into a bag and put the knife, bottle, and pocketbook into another

bag. They then left the apartment, Appellant having ordered Kanaras to take him to the Fiddler's Convention. En route, they stopped by a creek at Harmony Church Road where Appellant threw the bottle into some brush, burned the pocketbook and note, and threw some live rounds of ammunition into the creek. They drove further to a location in Cecil County where Appellant dropped the knife and gun into some stagnant water. Still terrified, being unsure whether Appellant possessed any further weapons, Kanaras drove Appellant to the Fiddler's Convention as directed. They walked around the Convention and Kanaras spoke with someone he knew. They left after an hour. Kanaras drove Appellant to Hall's Furniture Store in Aberdeen, where a friend of Appellant's threw the bag with the pants into a nearby dumpster. Appellant then went into the furniture store. Kanaras drove home."

Much circumstantial evidence was also adduced by the State as a part of its case in chief. Neighbors who had been with Hudson and Becker at the Golden Forty Club on the evening of 24 May, and were with them when they left, saw a blue 1980 Monte Carlo, a type of car frequently driven by Kanaras, follow Hudson and Becker to their trailer. The car was then occupied by two men, one of whom Becker referred to as Deno. As the babysitter caring for Becker's child was leaving the trailer shared by Becker and Hudson, she saw two men emerge from such a car and walk to the porch of the trailer.

Additionally, police officers, accompanied by Kanaras, found a knife and sheath, a gun, and a holster in a pool of water located in Cecil County. According to an expert, the expended bullets in Hudson's body could have been fired from that gun, and the bent shell casings found near Hudson's body were fired by that gun. The police officers, accompanied by Kanaras, also found six live rounds of .38 caliber ammunition, the remains of a burnt handbag, and a Smirnoff's bottle at Harmony Church Road. According to an expert, some of the bullets recovered from Hudson's body, as well as bullets recovered from the creek at Harmony Church Road, contained similar chemical compositions. In addition, according to experts, the recovered vodka bottle had human bloodstains on it that could have come from Becker, and a latent fingerprint that matched a fingerprint taken from the appellant's right index finger. Moreover, the police officers, accompanied by Kanaras, found a brown paper bag containing corduroy pants that were damp and smelled of bleach in a dumpster near Hall's Furniture Store. At the appellant's apartment, the police officers found a Marlboro box containing a white powder subsequently determined to be cocaine. According to experts, hair samples taken from the appellant microscopically matched hair found in Becker's garter belt and a blanket from her bed. The appellant's right boot contained a spot of blood, although there was not enough to tell if it was of human or animal origin, while Kanaras's left boot contained human blood.

> Finally, there was evidence to show that at about 12:30 a.m. on 26 May 1981, the appellant gave the police a statement, found by the trial court to be voluntary. In that statement, the appellant said that at or about 1:00 a.m. on 25 May, the appellant and Deno Kanaras had arrived at the Golden Forty Club where they remained until the club closed. The appellant stated that they then went to a weekend Fiddler's Convention in Cecil County where they remained until about 11:00 a.m. on 25 May. At that time, the appellant specifically denied having gone to Hudson's trailer in the Long Bar Harbor campground. Subsequently, however, the appellant admitted having been at Hudson's trailer with Kanaras after the Golden Forty Club closed. He stated that they were there to "talk about drugs" before going to the Fiddler's Convention. He indicated that after the purchase of some marijuana they left. The appellant explained the inconsistency in his statement as having resulted from his fear of becoming a suspect in the case.

Huffington I, 295 Md. at 3-7, 452 A.2d at 1212-14. On direct appeal from the Frederick County resentencing, the Court of Appeals of Maryland found that the "facts surrounding the incident leading to Huffington's conviction [on retrial] are fully set forth in our earlier opinion." *Huffington III*, 304 Md. at 564, 500 A.2d at 274.

REASONS FOR DENYING THE WRIT

I.

THE COURTS BELOW CORRECTLY REJECTED HUFFINGTON'S DUE PROCESS CLAUSE CHALLENGE TO THE STATE COURTS' DETERMINATION THAT THE RASSA TRANSCRIPT WAS INADMISSIBLE HEARSAY.

At the 1983 retrial, Huffington sought to introduce a transcript of the prior testimony of Stephen Rassa, a prosecution witness in the trial of Huffington's co-defendant, Deno Kanaras. Huffington's counsel, Alan Drew, proffered, without contradiction, that Rassa was unavailable, counsel having unsuccessfully tried to locate and subpoena him. The state courts ruled that the hearsay transcript was not admissible under the state law exception for former testimony because the State had not had a similar motive to develop Rassa's testimony in Kanaras's trial. *Huffington III*, 304 Md. at 564-74, 500 A.2d at 274-79. (App. to Pet. for Cert. at 49a-60a). The Fourth Circuit rejected Huffington's Due Process Clause challenge to this state law ruling, distinguishing *Chambers v. Mississippi*, 410 U.S. 284 (1973), and *Green v. Georgia*, 442 U.S. 95 (1979), on the ground that Rassa's testimony lacked "reliability" and did not "directly affect the ascertainment of guilt" in Huffington's case. *Huffington IV*, 140 F.3d at 584-85.

Huffington's challenge to the Fourth Circuit's ruling is unworthy of certiorari for the threshold reason that his attempt to extend *Chambers* and *Green* to this case is

barred by the *Teague v. Lane*, 489 U.S. 288 (1989) (plurality opinion), nonretroactivity doctrine. Huffington's convictions became final for *Teague* purposes on July 7, 1986. *See O'Dell v. Netherland*, 117 S. Ct. 1969, 1973-79 (1997); Statement of the Case, *supra*. The federal habeas courts "will not disturb a final state conviction on sentence unless it can be said that a state court, at the time the conviction or sentence became final, would have acted objectively unreasonably by not extending the relief later sought in federal court." *O'Dell*, 117 S. Ct. at 1973.

Here, it cannot be said a state court "would have felt compelled by existing precedent to conclude that the rule [Huffington] seeks was required by the Constitution." *Id.* Huffington's assertion that *Chambers* and *Green* require admission not only of directly exculpatory evidence but also mere impeachment evidence, (*see* Pet. for Cert. at 14-18), is not supported by the language or the facts of those decisions. In *Green*, the court in finding a due process violation emphasized that the evidence excluded by the state courts consisted of a confession by Green's co-defendant to having personally committed the rape and murder for which Green was sentenced to death. 442 U.S. at 97. In *Chambers*, the Court found a due process violation based on the combined effect of the state courts' denial of Chambers's request to cross-examine McDonald, who had confessed to the murder for which Chambers was on trial, and their exclusion of hearsay accounts of McDonald's confessions. 410 U.S. at 295-303. Huffington himself acknowledges that the Fourth Circuit and the Maryland courts are not alone in construing *Green* and *Chambers* as requiring only the admission of reliable, directly exculpatory evidence. (Pet. for Cert. at 15-17); *see United States v. Fowlie*, 24 F.3d 1059, 1069 (9th Cir.

1994) (distinguishing *Chambers* on the ground that Fowlie's proffered hearsay's "connection to Fowlie's innocence is far more attenuated" than the "directly exculpatory" evidence excluded in *Chambers*); *United States v. Parker*, 877 F.2d 327, 331-32 (5th Cir. 1989) (declining to "push the interpretation of *Chambers*" so as to require the admission of "indirectly exculpatory" hearsay).

In short, Huffington's claim under *Green* and *Chambers* proposes the application of a "new rule" that may not be applied retroactively unless one of the *Teague* exceptions applies. *O'Dell*, 117 S. Ct. at 1973, 1978. Huffington's proposed new rule does not remotely fall within either exception, *see id.*, rendering his claim *Teague*-barred and unworthy of certiorari.

Teague aside, Huffington's claim is unworthy of certiorari because there is no genuine intercircuit conflict. *See* Sup. Ct. R. 10(a). Huffington identifies the Second, Sixth, and Ninth Circuits as having decisions inconsistent with the Fourth Circuit's exculpatory/impeachment evidence distinction, (Pet. for Cert. at 16-17), but the cases he cites present, at best, mere intracircuit conflicts that are better resolved by the affected courts of appeal. *Wisniewski v. United States*, 353 U.S. 901, 902 (1957). As Huffington acknowledges, the Sixth Circuit's decisions are "mixed." (Pet. for Cert. at 17 n.7). The Ninth Circuit, moreover, has in at least one opinion limited *Chambers* to "directly exculpatory" evidence. *Fowlie*, 24 F.3d at 1069. The Second Circuit's decisions likewise present, at best, a mere intracircuit conflict. *See, e.g., Grochulski v. Henderson*, 637 F.2d 50, 55 (2d Cir. 1980), *cert. denied*, 450 U.S. 927 (1981) (distinguishing *Chambers* as allowing a defendant "to prove a declarant's prior confession to the

offense only where the "witness admitted in the presence of the jury that he had previously made a retracted confession").

Huffington's claim is unworthy of review for the additional reason that the Fourth Circuit was plainly correct in determining that Rassa's prior testimony was unreliable and did not "directly affect the ascertainment of guilt." *Huffington IV*, 140 F.3d at 585 (App. to Pet. for Cert. at 22a-23a). Huffington was convicted under a felony murder, rather than premeditated murder, theory. His defense at trial was that the actual perpetrator was Deno Kanaras, and that Huffington accompanied Kanaras to Diane Becker's trailer and to other destinations on the night of the murders but was not involved in the killings of Joe Hudson or Ms. Becker in any way. Rassa's testimony suggesting that Kanaras may have been looking for an accomplice to aid him in robbing Hudson, if indeed credible at all, would only have highlighted Huffington's recruitment and participation. *See Green*, 442 U.S. at 96-97 (indicating that although Green had been convicted of murder under an apparent felony murder theory, evidence showing that he did not directly commit the murders was nevertheless relevant to the issue of punishment and should have been admitted under *Chambers* at the capital sentencing hearing). Here, as was true in *Green*, Huffington's personal participation would certainly have been relevant to Huffington's eligibility for capital punishment, *see* Md. Code Ann., Art. 27, § 413(e)(1), but Huffington's death sentence was vacated long ago by the state courts. Statement of the Case, *supra*. Because the evidence was not at all "critical to [Huffington's] defense" at trial, *Chambers*, 410 U.S. at 302, further review is unnecessary.

II.

THE COURTS BELOW CORRECTLY REJECTED HUFFINGTON'S ASSERTIONS OF INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL.

Huffington in connection with his claim that trial counsel, Mr. Drew, rendered ineffective assistance of counsel at the 1983 retrial in effect proposes a bright-line rule that defense counsel must attempt to personally interview all potential defense witnesses and may not rely on transcribed testimony of the witnesses in prior, related proceedings in determining whether to present their testimony. (Pet. for Cert. at 21-25). However, as the Fourth Circuit noted, the cases on which Huffington has relied to support such a rule mainly "involve alibi witnesses or eyewitnesses critical to the determination of guilt, and none of Huffington's proffered witnesses fall into those categories." *Huffington IV*, 140 F.3d at 580 (App. to Pet. for Cert. at 13a). Given that Huffington's cases are thus factually distinguishable for these and similar reasons, Huffington's proposed rule is "new" and thus *Teague* barred, rendering his claim unworthy of certiorari. *See* Argument I, *supra*. That Huffington's cases are factually distinguishable also defeats his assertion of a genuine, intercircuit conflict. *See id.*

Huffington's ineffectiveness assertions need not be reviewed for the additional reason that they factually are without merit. The fact-specific nature of these assertions, preliminarily, is itself a reason to deny certiorari. *United States v. Johnston*, 268 U.S. 220, 227 (1925) ("We do not

grant ... certiorari to review evidence and discuss specific facts").

Huffington does not question trial counsel's closing argument advancing the theory of defense that the actual perpetrator was Deno Kanaras, and that Huffington accompanied Kanaras to Diane Becker's trailer and to other destinations on the night of the murders but was not involved in the killings of Joe Hudson or Ms. Becker. The range of defenses available to trial counsel in this regard was severely narrowed by Huffington's statements to investigating officers (the admissibility of which Huffington does not presently challenge) and by testimony that Huffington himself freely offered at his Caroline County guilt/innocence trial. *See* Statement of the Case, *supra*; *Huffington I*, 295 Md. at 7-9, 452 A.2d at 1214-15.

Huffington's Caroline County guilt/innocence testimony involved presentation of an alibi to the effect that he and Kanaras were together but then went their separate ways prior to the murders, thus indicating that Kanaras alone perpetrated the murders. *See Huffington I*, 295 Md. at 7-9, 452 A.2d at 1214-15 (summarizing Huffington's 1982 testimony). But even apart from the lack of success that affirmative alibi enjoyed before the particular jury there, the record in *Huffington I* indicates that Huffington's testimony was a lie. Immediately before Huffington testified, his trial counsel in a chambers conference advised the judge, in Huffington's presence, as follows:

> I feel that I cannot engage in the direct examination of this witness. [I]t seems to me that the code of professional responsibility precludes me from offering his testimony. At the same time the client-attorney privilege precludes me from furnishing ... the reason why I cannot do this.

Response to objections to magistrate's report and recommendation at 2 (quoting T. 1470 of record on appeal in *Huffington I*; *see also* Md. Rules of Professional Conduct, Comment to Rule 3.3 (discussing dilemma faced by an attorney whose client in a criminal case insists on presenting perjured testimony).

In the proceedings since that trial, Huffington has conspicuously declined to testify, and his theory of defense has depended much more on using cross-examination and other means simply to emphasize the evidence pointing to Kanaras as the principal in the murders, in lieu of presenting Huffington's affirmative alibi testimony. Huffington has tended also to minimize his reliance on his statement to the police, *Huffington I*, 295 Md. at 7-9, 452 A.2d at 1214-15, which seemed to indicate that Huffington and Kanaras were together for the entire night of the murders. Even now, Huffington does not argue that retrial counsel was ineffective in not presenting Huffington's personal testimony of an affirmative alibi. Indeed, although the evidence of guilt under any theory of defense remains overwhelming, the notion that Huffington was not present at Ms. Becker's trailer at any time on the night of the murders seems particularly outlandish in view of, among other evidence, the fact that Huffington's fingerprints and Ms. Becker's blood were discovered on a vodka bottle. *See* Statement of the Case, Part B, *supra*. The perpetrators had removed the vodka bottle and other evidence from Ms. Becker's trailer and attempted to dispose of it, along with other evidence, in an isolated area.

In light of these circumstances severely narrowing the range of defense theories available to counsel at the Frederick County retrial, it was hardly surprising that

Huffington's present counsel conceded at the post conviction hearing that "Mr. Drew's ultimate theory of defense, in our judgment, was tactically correct. It was the right idea, which was to lay the crime off on Deno Kanaras." Huffington also cannot dispute that he and Kanaras stand convicted at essentially equivalent levels of culpability; Huffington's first-degree murder convictions exist only under a felony murder theory, *see* Statement of the Case, *supra*, and Kanaras was likewise convicted of felony murder as to the second victim, Diane Becker, *Kanaras v. State*, 54 Md. App. 568, 572, 460 A.2d 61, 64, *cert. denied*, 297 Md. 109 (1983).

The narrow issue presented is thus whether counsel's efforts in attempting to portray Kanaras as the sole criminal agent and Huffington as a mere innocent associate were so unreasonable and prejudicial as to amount to a Sixth Amendment violation. As to the failure to locate and present Stephen Rassa, it was undisputed that Mr. Drew had a transcript of Rassa's testimony from Kanaras's trial, and had retained a private investigator to locate the witness and serve him with a trial subpoena. Mr. Drew testified that he chose to attempt to contact Rassa at the beginning of the voir dire process for the tactical reason that counsel concluded that too much advance warning would only serve to allow Rassa an opportunity to flee the jurisdiction so as to avoid having to testify. *Huffington IV*, 140 F.3d at 579-80. (App. to Pet. for Cert. at 10a-12a). There has never been any dispute that Rassa was very reluctant to appear as a witness at Huffington's trial. Huffington has failed to overcome the presumption that counsel's efforts in regard to Rassa represented an appropriate "trial strategy." *See Burger v. Kemp*, 483 U.S. 776, 794 (1987); *Darden v. Wainwright*,

477 U.S. 168, 186-87 (1986).

Huffington also cannot satisfy his burden of showing that counsel's failure to secure Rassa's appearance was "prejudicial." *See Lockhart v. Fretwell*, 506 U.S. 364, 368-71 (1993). It is difficult to conceive given the testimony and circumstantial evidence how any rational trier of fact could have concluded that Huffington's involvement was not at least that of a felony murderer, *see* Statement of the Case, Part B, *supra*, and Rassa's testimony that Kanaras was looking for an accomplice to aid him in robbing Joe Hudson would only have highlighted Huffington's recruitment and participation. Second, Huffington's post conviction evidence as to the repeated efforts that were required over the course of several years before Rassa could be located and forcibly brought to Maryland (well after the trial and direct review phases of Huffington's and Kanaras's cases had ended), *Huffington IV*, 140 F.3d at 579 (App. to Pet. for Cert. at 11a), only tends to confirm that Huffington's assertion that Mr. Drew could have succeeded in securing Rassa's attendance at trial is, at best, speculative.

Huffington's contentions regarding the remaining witnesses and the forensic evidence that Mr. Drew supposedly failed to investigate, (Pet. for Cert. at 25-26), are highly fact-specific and thus poor subjects for certiorari review. *See United States v. Johnston*, 268 U.S. at 227 ("We do not grant . . . certiorari to review evidence and discuss specific facts"). In any event, the decision below amply explains why counsel's efforts with respect to these matters were neither professionally deficient nor prejudicial. *Huffington IV*, 140 F.3d at 580-83 (App. to Pet. for Cert. at 11a-12a).

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that the petition for writ of certiorari be denied.

Respectfully submitted,

J. JOSEPH CURRAN, JR.
Attorney General of Maryland

GARY E. BAIR*
ANNABELLE L. LISIC
Assistant Attorneys General

Counsel for Respondent

**Counsel of Record*

October 9, 1998

capital/huffing.brf